IN THE

# Supreme Court of the United States

NO. 414

OCTOBER TERM, 1962

MICHAEL SHENKER, Petitioner,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

## BRIEF FOR PETITIONER

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## BRIEF FOR PETITIONER

### CITATIONS TO OPINIONS BELOW

The opinion of the trial judge, denying defendant's motion for judgment notwithstanding the verdict (R. 78-80) is reported at 196 F.Supp. 108. The opinion of the Court of Appeals for the Third Circuit (R. 82-88) is reported at 303 F.2d 596.

### JURISDICTION

The opinion of the Court of Appeals was filed April 11, 1962. A timely petition for rehearing, filed May 3, 1962, was denied on June 1, 1962. By order of the Chief Justice, the time for filing the petition for writ of certiorari was extended to September 14, 1962 (R. 91). Such

petition was filed September 5, 1962, and granted November 19, 1962 (R. 91). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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## QUESTIONS PRESENTED

1. Where only six of the eight active judges of a court of appeals take part in the decision of a petition for rehearing, and four of the six vote to grant rehearing, is the petition granted or denied?

2. Is a railroad liable, under the Federal Employers' Liability Act, for failure to provide a safe place to work for its employee who is injured when, in the course of his duties, he is performing work on the car and the premises of another carrier which his employer services by agreement with that carrier?

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## Statutes Involved

The statutory provisions involved are 28 U.S.C. § 46(c), and 45 U.S.C. § 51.

*28 U.S.C. § 46(c):* Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

*45 U.S.C. § 51:* Every common carrier by railroad while engaging in commerce between any of the several States or Territories or between any of the States and

Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

## STATEMENT OF THE CASE

Petitioner filed suit in the District Court for the Western District of Pennsylvania on November 21, 1957, against respondent, Baltimore and Ohio Railroad Company (hereafter "B. & O.") and against the Pittsburgh and Lake Erie Railroad Company (hereafter "P. & L.E.") (R. 1). The jurisdiction of the District Court was invoked because the case arises under the Federal Employers' Liability Act, 45 U.S.C. § 51.

Petitioner was employed, at the time of his injury, as a baggageman by the B. & O. at its Mahoningtown Station in New Castle, Pa. At this point the eastbound and westbound tracks of the B. & O. are immediately north of the eastbound and westbound tracks of the P. & L.E. The B. & O. station is north of the four tracks. A station of the P. & L.E. is to the south, between the two P. & L.E. tracks (R. 21). The P. & L.E. station is unmanned (R. 15). The B. & O. ticket agents sold tickets at the B. & O. station to P. & L.E. passengers (R. 15). By an arrangement between the two railroads (R. 10), B. & O. employees would service P. & L.E. trains stopping at Mahoningtown and running on P. & L.E. tracks (R. 61-62). Although petitioner was employed by the B. & O., paid by it, and subject only to the authority of B. & O. supervisory employees (R. 29, 46), his duties included loading and unloading baggage in P. & L.E. trains, as well as B. & O. trains, and janitor work in both the B. & O. and the P. & L.E. stations (R. 29, 45).

On October 15, 1956, petitioner was engaged in loading mail sacks on a P. & L.E. train. Both he and the baggage car attendant, a P. & L.E. employee, attempted to open the door on the P. & L.E. car to its full width

(R. 17), but were unable to open it more than 18 or 24 inches (R. 18, 36-37). The baggage car attendant, a P. & L.E. employee (R. 63), had reported the defective condition of the door to his superiors, but they had failed to repair it (R. 17, 26). The mail sacks being loaded were as large as 31 inches wide and 37 inches deep (R. 14). The larger sacks filled with mail weighed 80 to 100 pounds (R. 18). To get these large sacks through the 20 inch opening in the door, petitioner was compelled to exert unusual pressure, twisting the bags and endeavoring to force them through the small opening. In so doing he injured his back (R. 18). On subsequent examination, he was found to have sustained a ruptured intervertebral disc, which eventually required a laminectomy, and resulted in permanent disability (R. 79).

The trial court directed a verdict for the P. & L.E., finding it was not petitioner's employer within the Federal Employers' Liability Act, and that there was no diversity to support a common law claim (R. 78). The jury returned a verdict for petitioner against the B. & O. for $40,000 (R. 3). Motion for judgment n.o.v. was denied (R. 78-81).

On appeal by the B. & O., the judgment of the district court was reversed, in an opinion by Judge Goodrich, with whom Judge Ganey joined. Judge Kalodner dissented with opinion (R. 82-89). Petitioner petitioned for a rehearing. The petition was denied, per Goodrich and Ganey, JJ., with Judges Biggs, Kalodner, Staley, and Smith dissenting from the denial of rehearing. Judges Hastie and McLaughlin took no part on the motion for rehearing (R. 90).

## SUMMARY OF THE ARGUMENT

I. The policy of the statute permitting rehearings en banc in the courts of appeals is to provide that the active circuit judges shall determine the major doctrinal trends of the future for their court. This purpose is not served if a decision must stand though a majority of the participating judges believe rehearing en banc should be granted. Only an overly-literal reading of the statute, 28 U.S.C. § 46(c), can justify such a result, and past decisions establish that this statute need not be read with such a debilitating literalness.

II. The Court of Appeals thought that the issue was whether the negligence of P. & L.E. could be imputed to the respondent B. & O. In fact respondent should be held liable for its own negligence, rather than for the imputed negligence of someone else. Respondent was under a continuing non-delegable duty to exercise reasonable care to provide a safe place to work. This duty exists even though the employee is required to perform duties on the premises of someone else. In the exercise of reasonable care, respondent could, by inspection or otherwise, have known of the defective door which led to petitioner's injury. It is chargeable, therefore, with constructive knowledge of the defect, and with negligence for failure to exercise reasonable care to provide petitioner with a safe place to work.

## ARGUMENT

### I.

**When a majority of the judges participating vote to grant rehearing en banc, such rehearing should be granted.**

At the time in question, there were eight judges in active service on the Court of Appeals for the Third Circuit. Six judges participated in decision of the petition for rehearing en banc. Four judges voted to grant the petition. Two judges voted to deny the petition. On those facts, it was held that the petition was denied, on the ground that "a majority of the circuit judges of the circuit who are in active service" had not voted to grant the petition, as seemingly required by 28 U.S.C. § 46(c). Such a holding may be supported by the literal language of the statute, but this is a statute which has not been, and should not be, read literally, when, as here, the result is contrary to the purpose of the statute.

In its first decision upholding the right of the courts of appeals to sit en banc, this Court said that it was willing to make a "sacrifice of literalness for common sense." *Textile Mills Securities Corp. v. Commissioner of Internal Revenue,* 314 U.S. 326, 334 (1941). A similar sacrifice is required here to avoid an absurd result. The evident policy of 28 U.S.C. § 46(c), this Court has said, is to provide that the active circuit judges shall determine the major doctrinal trends of the future for their court. *United States v. American-Foreign S.S. Corp.,* 363 U.S. 685, 690 (1960). This purpose is effectively thwarted if a decision can stand as the decision of the court of appeals though four of the six judges who have

considered the matter are dissatisfied with it. What precedential value would such a decision have? Should district judges within the circuit follow the decision when it is apparent on the face of the Federal Reporter that there is a substantial likelihood that a different result will be reached in the future if the same question should come on before a different panel of the court of appeals, or even before the full court? Such difficult questions are avoided if the statute is construed sensibly to mean that a majority of the participating judges are to prevail, as is the case with every other matter coming before a federal appellate court.

This Court has already indicated that § 46(c) is not to be read literally, by specifically approving as a possible practice grant of rehearing en banc by a majority of the three judges of the original panel. *Western Pacific Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 261 (1953). This is in fact the practice in at least one circuit. See Rule 15(e), Eighth Circuit Rules; Note, *En Banc Procedure in the Federal Courts of Appeals*, 111 U.Pa.L.Rev. 220 (1962). If, consistent with the statute, the full court can delegate to the three judges of the panel the power to order or refuse rehearing, it is equally consistent with the statute for the court to delegate this power to the six judges who participated in decision of the motion for rehearing. There are many reasons—illness, absence from the circuit, statutory disqualification—why a judge may take no part in decision on a petition for rehearing. On the view taken by the court below, a judge who does not participate in any way is counted, in effect, as if he had voted to deny rehearing. Suppose, for example, that the proceedings

in the district court in this case had been conducted by one of the nonparticipating judges of the court of appeals, sitting in the district court by assignment. There is an absolute statutory bar against such a judge participating in decision of the appeal. 28 U.S.C. § 47. Yet under the practice followed below, that judge would be counted as if he had voted to deny rehearing of the decision reversing his own judgment.

The construction which has been put on the second sentence of § 46(c) is instructive. In the first legislative draft of what is now § 46(c), the second sentence read: "A court in banc shall consist of all active judges present and available in the circuit." H.R. 3498, 79th Cong., 1st Sess. In the next draft, H.R. 7124, 79th Cong., 2d Sess., this language was changed to the form in which it was adopted, so that it read: "A court in banc shall consist of all active circuit judges of the circuit." Yet this Court has said that the two drafts "did not differ in any material respect," *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 254 (1953), and the Third Circuit has held that the second sentence is not to be read literally, and that it can hear a case en banc even though one of the judges in active service is away from the circuit and not participating. *Alltmont v. United States*, 177 F.2d 971 (3d Cir. 1949). It is incongruous to read the second sentence sensibly, in the face of legislative history which would seem to suggest that Congress deliberately excluded such a reading, while at the same time making a fortress of the dictionary in construing the first sentence of the same statute.

Under the rule in the *Alltmont* case, if rehearing had been granted here, the case could have been heard

in the absence of Judges Hastie and McLaughlin, and a vote of four-to-two for petitioner would have reinstated his judgment. If all eight judges had participated after rehearing was ordered, and four judges had voted for petitioner on the merits, the contrary decision of the panel would be superseded and his judgment affirmed. *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers,* 294 F.2d 399 (2d Cir. 1961), affirmed 370 U.S. 254 (1962); R.C., 51 Harv.L.Rev. 1287 (1931); Note, 111 U.Pa.L.Rev. 220, 229-230 (1962). Yet he is here held to have lost when four judges voted in his favor on the petition for rehearing. The leading students of rehearing practices point to "a constant and understandable tendency on the part of judges * * * to blend the question of granting rehearing with the question of correctness of the prior decision." Louisell & Degnan, *Rehearing in American Appellate Courts,* 25 F.R.D. 143, 159 (1960). To the extent that the vote of four judges in favor of rehearing reflects, even in part, a determination by them that the decision of the panel was wrong and that the judgment below should have been affirmed, the situation is indistinguishable from that presented after rehearing has been granted, where four votes for petitioner would have resulted in affirmance of the judgment. We do not press that argument, however, for at a minimum, the vote of the four judges surely demonstrates their unwillingness to have the decision of the panel, without further consideration, set the law of the Third Circuit for the future. When a majority of the participating judges evidence such dissatisfaction with a decision, the purpose of the rehearing en banc statute demands that the rehearing be granted, and the language of the statute is not to the contrary.

**If it is permissible to construe "all active circuit judges of the circuit" in the final sentence of 28 U.S.C. § 46(c) as meaning all active circuit judges who are not disqualified or otherwise not participating, a similar construction is permissible, and required by common sense, in the preceding sentence of that statute.**

## II.

**The Federal Employers' Liability Act imposes on an employer a non-delegable duty to exercise reasonable care to furnish its employees a safe place to work, even when they are off the employer's premises, and constructive knowledge will be imputed to the employer of any defect which would have been discoverable upon inspection.**

The issue on the merits in this case is whether a railroad is liable to its employee where he is injured on the premises of a third party because a defective condition on those premises creates an unsafe place to work. The court below undertook to resolve that issue by considering whether the negligence of the third party is attributable to the employer carrier as a matter of law. It decided that it was not, in the circumstances of this case, citing as sole authority for its decision the Second Restatement of Agency. 303 F.2d at 598. Decisions of this Court, and the courts of appeals, have made it plain that refined concepts of common-law agency have no place in the solution of the problem.

The question here is not whether the negligence of a third party can be attributed to the employer, but whether the employer is itself negligent in breaching its non-delegable duty to exercise reasonable care to furnish

its employees a safe place to work. It is settled that the Federal Employers' Liability Act, 45 U.S.C. § 51, imposes such a duty on the employer, and that the duty is a continuing one which is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent. *Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350, 353 (1943). It is settled, too, that the duty continues even when the carrier requires its employees to go onto other premises to work, and that the carrier is liable though the defect was in premises over which the railroad had no control. *Ellis v. Union Pacific R. Co.*, 329 U.S. 649 (1947).

The most recent case from this Court in point is *Harris v. Pennsylvania R. Co.*, 361 U.S. 15 (1959), reversing 168 Ohio St. 582, 156 N.E.2d 822 (1959). Harris was a Pennsylvania Railroad employee. He was ordered out as a member of a wrecking crew to assist in retracking two cars which had left the tracks of the Nickel Plate Railroad. He was injured because of oil on a Nickel Plate tie. There was no evidence that the Pennsylvania placed the oil there, or knew of its existence. In the view of the Ohio Supreme Court, this was enough to defeat liability:

> Surely the defendant can hardly be held to the duty of going over the premises of another railroad with a fine tooth comb to discover every imperfection thereon before sending its employees there to do a job for which they have been trained and where they might expect to meet conditions to be found in the operation of railroads generally.

168 Ohio St. at 587, 156 N.E.2d at 826. Two dissenters in this Court took a similar position. 361 U.S. at 27. But

the majority of this Court held that on these facts the jury could, with reason, find that employer negligence played a part in producing the injury, and reinstated Harris's judgment against the Pennsylvania.

If the analysis adopted by the Third Circuit in the present case had been employed in the *Harris* case, Harris would have been denied recovery unless it were found that the Nickel Plate was an agent of the Pennsylvania and thus that the negligence of the Nickel Plate was attributable to the Pennsylvania. That is not the analysis employed by this Court, in the *Ellis* and *Harris* cases. It is not the analysis employed by the other circuits, which have held repeatedly that when a railroad sends its employee to work on premises not under the railroad's control, it is liable if it fails to exercise reasonable care to make sure that the employee is given a safe place to work. *Atlantic Coast Line R. Co. v. Robertson*, 214 F.2d 746 (4th Cir. 1954); *Chesapeake & O. Ry. Co. v. Thomas*, 198 F.2d 783 (4th Cir. 1952); *Payne v. Baltimore and Ohio R. Co.*, 309 F.2d 546 (6th Cir. 1962); *Kooker v. Pittsburgh & L. E. R. Co.*, 258 F.2d 876 (6th Cir. 1958); *Beattie v. Elgin, J. & E. R. Co.*, 217 F.2d 863 (7th Cir. 1954); *Terminal R. Ass'n of St. Louis v. Fitzjohn*, 165 F.2d 473 (8th Cir. 1948); *Denver & R. G. W. R. Co. v. Conley*, 293 F.2d 612 (10th Cir. 1961). In the *Terminal Railroad Association* case, for example, the plaintiff was injured while working on premises owned and controlled by the United States. He was paid by the railroad but worked full time on government property on a government engine. It was held that he was still an employee of the railroad, within the Act, and that the railroad was liable where conditions on the premises owned by the government created an unsafe place to

work. Again in the *Kooker* case the injury, as in the present case, occurred at a point where tracks of the B. & O. parallel tracks of the P. & L.E. Kooker, an employee of the P. & L.E., was walking on a customary path across the tracks when he slipped on ice and was injured. The Sixth Circuit described evidence from which the jury could have found that Kooker slipped on a portion of the path under the dominion of the P. & L.E., but went on to say that this was not necessary:

> But the duty of an employer to provide his servants with a safe place to work is not so circumscribed and there are many federal cases which hold that the obligation of an employer may extend beyond its premises and to property which third persons have a primary obligation to maintain.

258 F.2d at 878.

Any other rule would deprive railroad employees of much of the protection which the Act purports to give them. On the view taken by the Third Circuit, an employee required to work on the line of another carrier, could not recover under the Act from the other carrier, because he is not an employee of that carrier. He could not recover from his own employer in the absence of some showing that the second carrier was an agent of the employer. It is true, as respondent has suggested, that such an employee would still have a common law right of action against the other carrier, but the Federal Employers' Liability Act is premised on a belief that common law remedies are not adequate protection for railroad employees.

The fatal flaw in the agency analysis made by the Third Circuit has been well exposed by the Utah Supreme Court:

> What the employee wants and needs is a reasonably safe place to perform his duties. He is not concerned with and indeed cannot know the technicalities of ownership, rental, lease or reciprocal exchange of facilities of an involved railroad system. For him to have the assurance of safety in some phases of his work and to be exposed to danger at his own risk and responsibility in others would be contrary to reason. It might even be argued that he could better fend for himself on the master's premises where he was acquainted with his surrounding than on premises of third parties with which he is unfamiliar. The employer exercises exclusive choice both as to the place of work and control over safety factors. It is therefore not unreasonable to charge him with the duty of providing a safe place to work.

*Butz v. Union Pacific R. Co.*, 120 Utah 185, 193, 233 P.2d 332, 336 (1951). The Sixth Circuit has recently expressed a similar view:

> Under FELA the employer is the one owing the duty to the employee. The employee need not look elsewhere for his protection. He has a right under FELA to rely on his employer and none other. When the employer delegates its duty, or abdicates its control, the employer takes the risk, not the employee.
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> *Payne v. Baltimore and Ohio R. Co.*, 309 F.2d 546, 549 (6th Cir. 1962)

In *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326 (1958), this Court refused to permit an employer to

avoid its responsibility under the Act by engaging another railroad to perform part of its work. The decision below would permit avoidance of responsibility by sending the employees to work on another railroad.

The sound view, amply supported by the authorities already cited, is that the duty of the employer is the same when he requires his employee to work on the premises of another as it is when the employee is working on the employer's premises. This duty is one of reasonable care, but it is settled in the cases that constructive knowledge will be imputed to the employer, and thus want of reasonable care found, if the defect on the premises to which the employee is sent would have been discoverable upon inspection. The case most frequently cited for this proposition is *Beattie v. Elgin, J. & E. R. Co.*, 217 F.2d 863, 866 (7th Cir. 1954), where the court said:

> Inasmuch as plaintiff at the time of the accident was in a place where his assigned duties required him to be, defendant on the issue of negligence was chargeable with knowledge of the conditions which in the exercise of reasonable care it could have ascertained.

This is not, however, the only case nor even the earliest case in point. In *Schlueter v. East St. Louis Connecting Ry. Co.*, 316 Mo. 1266, 1282, 296 S.W. 105, 112 (1927), many cases are cited and discussed in support of the proposition that a railroad company which runs its engines and trains over tracks owned by another company is bound to know and to see that those tracks are in a reasonably safe condition for use by its own employees, and that constructive knowledge of the defective track

will be attributed to the employer when the evidence shows that the employer should, or could by the exercise of ordinary care, have known of the defective condition. A state court, in *Van Horn v. Southern Pacific Co.*, 141 Cal.App.2d 528, 297 P.2d 479, 481-482 (1956), relied on the *Beattie* case, above, for the proposition that "respondent had the duty to inspect the pathway and to warn appellant of any dangerous condition thereon of which respondent had knowledge, either actual or constructive." In *Chicago G. W. Ry. Co. v. Casura*, 234 F.2d 441, 448 (8th Cir. 1956), the court recognized a duty to inspect the premises to which an employee is sent, and said that a railroad must use "ordinary care to discover the unsafeness of the place in which plaintiff is required to work and to use ordinary care to have it made into a reasonably safe place." To the same effect see *Chicago G. W. Ry. Co. v. Smith*, 228 F.2d 180, 184 (8th Cir. 1955), and *Denver & R. G. W. R. Co. v. Conley*, 293 F.2d 612, 613 (10th Cir. 1961).

The failure of the door to open more than two feet, the defect which caused petitioner's injury, was in fact known to the P. & L.E. and thus could, by inspection, have been discovered by the respondent B. & O. Just before petitioner was injured, he talked about the door with the P. & L.E. baggageman inside the car he was loading. The baggageman told him that he had earlier reported the defective condition of the door to his superiors, and that they had failed to repair it (R. 17, 26).

Respondent has argued heretofore that the rule which we have described is applicable only where the defect away from the employer's premises is of a customary and continuous condition, and does not apply

where the employee is injured by a sporadic or unusual defect. There is no such rule. Surely the grease on the tie which caused Henry Harris to fall was not a customary and continuous condition. Indeed the evidence was very slim on which it was found that there was grease on the tie at all. Yet Harris was permitted to recover. *Harris v. Pennsylvania R. Co.*, 361 U.S. 15 (1959). It is beyond belief that the ice and snow on which Donald Kooker slipped was a customary and continuous condition, but he too was allowed to recover. *Kooker v. Pittsburgh & L.E. R. Co.*, 258 F.2d 876 (C.A. 6th, 1958). The accumulation of ashes which caused the derailment in which Ralph Payne died was caused by rain during the night preceding the accident. *Payne v. Baltimore and Ohio R. Co.*, 309 F.2d 546, 548 (6th Cir. 1962). The length of time the defect has existed is a factor which the jury will consider in determining whether the employer could, with reasonable care, have discovered it, but that is all it is. Here the jury has considered the matter and determined that respondent should, in the exercise of reasonable care, have been aware of the defective door which led to petitioner's injuries. Respondent is, therefore, liable, whether or not on some nicety of agency law the actual knowledge of the P. & L.E. can be imputed directly to the B. & O.

## CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed, either with directions to reinstate the judgment of the trial court for petitioner, or to grant rehearing en banc in the court of appeals.

Respectfully submitted,

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